**STATE OF MICHIGAN**
**SUPREME COURT**

ALESIA HARRIS, widow and personal representative of HENRY HARRIS (DEC'D),

Plaintiff-Appellant,

SC: 14021
COA: 285426
WCAC: 06-000256

vs.

GENERAL MOTORS CORPORATION,

Defendant-Appellee

_____/

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**APPELLANT'S MOTION FOR RECONSIDERATION**

FILED
MAY - 3 2010
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

## APPELLANT'S MOTION FOR RECONSIDERATION

NOW COMES Plaintiff-Appellant, Alesia Harris, in her capacities as widow of, and Personal Representative of the Estate of Henry Harris, deceased, and pursuant to MCR 7.313 (E), moves for Reconsideration of the Court's order of April 16, 2010, denying her Application for Leave to Appeal for the following reasons:

1. The Court needs to resolve a conflict in case law of this State between *Woodburn v Oliver Machinery Co*, 257 Mich 109 (1932) and *McClain v Chrysler Corp*, 138 Mich App 723 (1984), regarding Workers' Compensation law and unexplained falls in the workplace. This case arises out of a fall from an unexplained cause in the restroom at the workplace, the injuries from which resulted in the decedent's death.
2. This Court in a unanimous decision in *Woodburn*, held that a worker's death as the result of an unexplained fall at the workplace, "in the usual and ordinary occupation therein...in the line of travel where discharge of his duties usually and ordinarily took him, severely injured about the head, from the injuries it is probable he died, is, we think, sufficient to raise a presumption the injuries to deceased arose out of and in the course of employment." 257 Mich 109, 111.
3. The Court of Appeals in *McClain* announced without citation that unexplained falls were not compensable—"{the} arguments for compensation for injuries of unknown causal relationship to their employment have merit, but are not a recognized theory in this state." 138 Mich App 723, 730-2.
4. The conflict occurs because of a misreading by the Court of Appeals in *McClain* and this case, of the Court of Appeals' decision of *Ledbetter v Michigan Carton Co*, 74 Mich App 330 (1977), and the treatise which underlay the logic for the decision.

In the matter of *Ruthruff v Tower Holding Corp, **on reconsideration,*** 261 Mich App 613 (2004), the Court of Appeals explained in the difference in the types of work injuries and their proper treatment. This case involved a neutral risk injury where the issue was whether the injury occurred in the course of employment. The Court of appeals cited then quoted *Ledbetter* and its citation of the Larson treatise:

> " In *Ledbetter*, the employee suffered a seizure and fell, striking his head on his employer's concrete floor. He died a week later as a result of his injuries. *Id.* at 332. The issue raised before this Court was whether injuries resulting from an idiopathic fall[1]
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> [1 This Court defined an idiopathic fall as "one resulting from some disease or infirmity that is strictly personal to the employee and unrelated to his employment." *Ledbetter*, *supra,* p 333.]
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> onto an employer's level floor are compensable under the WDCA. *Id.* at 332-333. This Court recognized the general rule that an injury did not arise out of employment where the predominant cause of the harm was attributable to personal factors and the circumstances of the employment did not significantly add to the risk of harm:
>
> [quoting *Ledbetter*] In personal risk cases, including idiopathic fall situations, the sole fact that the injury occurred on the employer's premises does not supply enough of a connection between the employment and the injury. Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied. The policy justification for this line of analysis in personal risk cases has been adequately expressed by Professor Larson:
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> > "It should be stressed that this requirement of some employment contribution to the risk in idiopathic-fall injuries is a quite different matter from the requirement of increased risk in, say, lightning cases. The idiopathic-fall cases begin as personal-risk cases. There is therefore ample reason to assign the resulting loss to the employee personally. The lightning cases begin as neutral risk cases. There is therefore no reason whatever to assign the resulting loss to the employee personally. To shift the loss in the idiopathic-fall cases to the employment, then, it is reasonable to require a showing of at least some substantial employment contribution to the harm. But in neutral-risk cases, the question is not one of shifting the loss away from a prima facie assignment to the employee at all, since there has never been ground for any such assignment; all that is needed to

> tip the scales in the direction of employment connection, under the positional-risk theory, is the fact that the employment brought the employee to the place at the time he was injured—an extremely lightweight casual factor, but enough to tip scales that are otherwise perfectly evenly balanced." Larson, Workmen's Compensation Law, *supra* at 3-220-3-221.
>
> While this Court firmly believes in the principle that employers should be responsible for work-related injuries of their employees, we do not feel that such responsibility should be stretched to include injuries predominantly personal to the employee. [*Ledbetter*, *supra* at 334-336.]"
>
> The Court then upheld the denial of dependency benefits because factors strictly personal to the plaintiff caused his fall and the circumstances of his employment did not contribute to his injuries. *Id.* at 336-337." *Ruthruff*, supra.

In *Ruthruff,* the Court of Appeals held that a neutral risk injury would be compensable and remanded for determination of whether the injury occurred in the course of employment.

5. In this matter the Plaintiff seeks remand to the WCAC or the Board of Magistrates. To deconstruct the issue, because it has become somewhat layered by the appeals, the appeal in this case was taken due to the factual error committed by the Magistrate. The Magistrate erred in factually positioning the deceased so that he could not have slipped and fallen as was alleged. The Magistrate had him stationary with both feet firmly planted in front of the urinal, ascribing this to the only witness in the room *when there was no such testimony* by that, or any other witness. All expert witnesses in fact agreed that the most likely cause was that of a fall while Plaintiff was in motion. The WCAC acknowledged this error but held it to be harmless, with a member dissenting that it was not. The WCAC majority held that a slip and fall was not compensable, that he might have "simply tripped on his own feet," (WCAC-6) and that the error was irrelevant. The Court of Appeals affirmed stating that the WCAC majority was correct and that unexplained cause falls are not compensable,

essentially holding that a slip and fall on the job is not compensable unless the work caused the slip or the location accentuated the damage from the fall. As this Court's dissent pointed out the Court of Appeals has "conflated" personal cause (idiopathic) falls with unexplained cause (neutral risk) falls. This contradicts the very language of the Larson treatise which the Court of Appeals in *Ledbetter* used to support its reasoning. Larson specifically stated the difference and decried the conflation:

> "The basic rule on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. The currently controversial question is whither the effects of an idiopathic fall to the level ground or bare floor should be deemed to arise out of the employment.
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> **It should be stressed that the present question, although often discussed in the same breath with unexplained falls, is basically different, since unexplained-fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin."** Emphasis added. Larson's 9.01[1]"

In other words, what the Court of Appeals here has done is equate all level floor falls as non-compensable *regardless of the risk being personal or neutral,* and that is not the rule in Michigan, nor has it been for the past 75 years.

6. This Court needs to grant Plaintiff's Application to resolve this conflict brought out by a misreading and misapplication of fundamental principles of Workers' Compensation law by the Court of Appeals and WCAC.

WHEREFORE, Plaintiff-Appellant prays that this Motion for Reconsideration be granted and the Application for Leave to Appeal be granted to resolve this conflict and remand the matter back to the WCAC or the Board of Magistrates for findings in line with the facts and the law.

Respectfully submitted,

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May 4, 2010